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In The

Supreme Court of the United States

October Term, 1993

CLINTON EDWARD VINCENT, JR., Administrator of the Estate of Myra Lisa Vincent Knick,

Petitioner,

v.

CITY OF LEXINGTON, a Virginia Municipal Corporation; BRUCE BEARD, City of Lexington Police Chief,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. FAIN RUTHERFORD
FRANK K. FRIEDMAN
(Counsel of Record)
RANDY V. CARGILL
WOODS, ROGERS & HAZLEGROVE
P. O. Box 14125
Roanoke, Virginia 24038-4125
(703) 983-7600

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether the courts below erred in determining that a policeman who murdered his wife in the course of a private domestic dispute did not act under color of state law under 42 U.S.C. § 1983?

Whether the courts below erred in failing to find a duty on the part of a municipality and its Chief of Police to protect a spouse from domestic violence where there was no evidence that either the municipality or Chief knew the spouse was in danger?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 6

I. KNICK DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE MURDERED HIS WIFE IN THEIR HOME IN THE COURSE OF A HEATED ARGUMENT 7

II. DEFENDANTS HAD NO DUTY TO PROTECT MRS. KNICK FROM HER HUSBAND 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990) 10

Blum v. Yaretesky, 457 U.S. 991 (1982) 9

Bonsignore v. City of New York, 683 F.2d 635 (2d Cir. 1982) 8

Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983) 8

City of Los Angeles v. Heller, 475 U.S. 796 (1986) 7

Cornelius v. Town of Highland, 880 F.2d 348 (11th Cir. 1989) 10

Cortes Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir. 1988) 10

Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992) 13

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 11, 12

Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1963) 8

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 7

Martinez v. California, 444 U.S. 277 (1980).....10, 12

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 7

Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987) 10

Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987).....9, 10

TABLE OF AUTHORITIES – Continued

Page

Polk County v. Dodson, 454 U.S. 312 (1981) 7

Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) 11

San Francisco Arts and Athletics v. United States Olympic Committee, 483 U.S. 522 (1987) 9

Screws v. United States, 325 U.S. 91 (1945) 5, 8, 11

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) 13

United States v. Classic, 313 U.S. 299 (1941) 7

United States v. Tarpley, 945 F.2d 806 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1960 (1992) 11

Vosburg v. Solem, 845 F.2d 763 (8th Cir. 1988) 10

West v. Atkins, 487 U.S. 42 (1988) 7

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 7, 9, 10, 11

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia (Pet. App. 4-13) is not reported. The opinion of the Fourth Circuit Court of Appeals (App. 1-5)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. The petition for a writ of certiorari was filed on November 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On September 29, 1990, Jerry Knick ("Knick"), then a City of Lexington, Virginia ("City") policeman, fatally shot his wife in their home. The administrator of Mrs. Knick's estate subsequently filed suit against the City and its Chief of Police, Bruce Beard, alleging under 42 U.S.C. § 1983 and Virginia law that they were legally liable for Mrs. Knick's death. The district court granted the respondents' motion for summary judgment as to the § 1983

[1] Petitioner omitted a portion of the court of appeals' opinion. Respondents have attached the entire opinion hereto as an appendix.

claim[2] (Pet. App. 12). The court of appeals affirmed in a *per curiam* unpublished opinion (App. 1-5).

1. Following a heated argument, Jerry Knick shot and killed his wife in their home in Lexington, Virginia. Knick is now serving a ten-year term of imprisonment following his state court conviction for second-degree murder.

The argument between Knick and his wife started in the morning of September 29, 1990, when Mrs. Knick complained about Knick's reluctance to "get affectionate" (J.A. 664).[3] Knick admitted, during his trial for murdering Mrs. Knick, that he was involved in a "[s]exual relations affair" with another woman and that his wife had often complained that he was not spending enough time with her (J.A. 666; 673-74). Knick canceled plans to take his family to the park that day and instead stayed home, off and on arguing with his wife, until he went to work at about 8:00 p.m. (J.A. 670-72).

Shortly after Knick went to work, Mrs. Knick called Sergeant Miller of the Lexington Police Department and asked him to come to her home. Miller, a friend of the family, agreed to come to the Knick home where Mrs. Knick discussed her dissatisfaction with her marriage (J.A. 660). While the two were talking, Knick, who was on duty, came to his home and "was angry to find Miller

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[2] The court dismissed without prejudice petitioner's state claims (Pet. App. 13). Those claims are now pending before the Circuit Court for Rockbridge County, Virginia (Case No. L-166-92).

[3] Citations are to the Joint Appendix ("J.A.") filed in the court below.

there" (App. 3). Knick stayed for a few minutes and left, stating that he would let Miller and Mrs. Knick finish their conversation.

Knick returned about an hour later and told Miller to leave. Knick then aggressively questioned his wife about why Miller was there and became enraged when Mrs. Knick would not answer. According to Knick, his wife "had an expression on her face – a type of smurk [sic] – that pretty much said to me that, you know, she knew she had made me jealous and was glad of it . . . " (J.A. 680). Knick repeatedly demanded to know "what the hell was [Miller] doing [there] . . . " but his wife "still wouldn't answer" (*id.*). Knick "slapped" his wife, pulled his service pistol from his holster and warned her "Don't you ever have [Miller] here again" (J.A. 682). According to Knick, his wife grabbed the weapon, causing it to fire one round into her left temple (J.A. 683-84). Notwithstanding his claim of accident, Knick was convicted of second-degree murder (murder with malice) in state court.

2. Petitioner devotes much of his brief to discussing allegations of fact which, in his view, suggest that Knick's criminal act was somehow connected to his duties and that respondents are responsible for the murder. Focusing on Mrs. Knick's turn-in of her husband's weapon almost nine months before the murder, petitioner asserts a connection between this incident and the murder. In fact, Mrs. Knick specifically stated when she turned in the weapon that she was not concerned for her safety, that she was concerned that Knick would threaten suicide with the weapon as he had in the past when confronted with his infidelity (J.A. 440-42). Following return of the weapon, Knick performed his duties without incident

until the murder. Indeed, Knick's superiors and fellow officers all agreed that he was a professionally competent, dependable policeman (J.A. 153, 210-11, 249, 272-73, 350-51, 360-61, 389, 409-10, 435-36, 475).

Petitioner inaccurately states that his expert witnesses testified that there was a causal connection between the murder and Knick's police training. In fact, each said quite the opposite. Petitioner's "police practices" expert testified that Knick was "a murderer at the time he shot his wife . . . that is all he was" (J.A. 584) and conceded that no amount of training and supervision can prevent a man from going into a "jealous rage" (J.A. 587). Petitioner's police psychologist testified that even if the counseling and training which he suggests should have occurred, had occurred, there is no assurance that Knick would not have killed his wife in a jealous rage (J.A. 623).

Petitioner takes similar liberties with the facts in asserting that Knick had a "history of excessive force" (Pet. 10) and that "quickdraws" of weapons was a "prevalent practice" in the department (Pet. 11). In fact, Knick was disciplined on one occasion in his eight years as a policeman for improper use of a stun gun to subdue an arrestee (J.A. 26-27) and there was no evidence that quickdraws were a "prevalent practice."[4] To the contrary,

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[4] Petitioner makes references to the deposition testimony of Officers Smith, Nedrow and Pedersen to support this allegation. Officer Smith testified that he saw Knick "handle" his weapon more than other officers (J.A. 419). Officer Nedrow said that he saw Knick, after unloading his weapon, pull it several times while breaking in a new holster (J.A. 392). Officer Pedersen testified that he never saw Knick mishandling his weapon and

the written policy of the Lexington City Police Department was that weapons could be drawn only on the firing range or when a life is in jeopardy (J.A. 529). Significantly, Knick acknowledged receipt of the policy and was trained and had trained others to follow it (J.A. 706). Knick, however, drew a distinction between what he was trained to do and "personal life [which] is a whole lot different" (J.A. 704). This fundamental point escapes petitioner.

3. The district court, upon considering the parties' briefs, oral argument and supporting evidence, granted the City's and Chief Beard's motion for summary judgment as to the § 1983 claim. The court found that Knick was not acting under color of state law when he shot and killed his wife, stating: "This was a garden variety domestic dispute which had a tragic ending – the fact that Knick was a police officer was incidental and had nothing to do with state authority" (Pet. App. 12).

4. The court of appeals, in a *per curiam* opinion, affirmed. It had "no difficulty concluding that Officer Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman" (App. 4). Noting that this Court "has made clear that acts of police officers in the ambit of their personal pursuits are plainly excluded from the term 'color of law' " (citing *Screws v. United States*, 325 U.S. 91, 111 (1945)), the court found that Knick was not acting under color of state law "when he stopped by his house or when he shot his wife" (App. 4).

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that it was permissible to draw an unloaded weapon to practice police skills (J.A. 384).

Moreover, the court held that the district court's grant of summary judgment was independently justified on the ground that "there is simply no evidence that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death" (App. 4-5).

ARGUMENT

Petitioner contends (Pet. 23-30) that Knick acted under color of state law when he murdered his wife in their home and faults the court of appeals for failing to recognize his decedent's "liberty interest" in being free from domestic violence at the hands of a police officer. The court of appeals correctly determined that Knick did not act under color of state law and its decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, the court of appeals' decision reflects a routine application of settled principles of law to a particular set of facts. Petitioner's claim of a split in the circuits regarding color of state law analysis rests on the misguided notion that because other courts found state action in materially different factual circumstances, the court below should have found state action under the facts of this case. Further review of this case is not warranted.

I. KNICK DID NOT ACT UNDER COLOR OF STATE LAW WHEN HE MURDERED HIS WIFE IN THEIR HOME IN THE COURSE OF A HEATED ARGUMENT.

Absent some action taken under color of state law, there can be no § 1983 liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). In *Monell*, this Court expressly held that imposition of § 1983 liability against a municipality or one of its supervisory employees required proof of an underlying constitutional violation by a municipal employee. *Monell*, 436 U.S. at 690-91. *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point" (emphasis in original)); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929 (1982) ("under color of state law" requirement of § 1983 and "state action" required for constitutional violation are identical).

Applied to this case, the law is clear that if Knick's murder of his wife was not "under color of state law," then the City and Chief Beard cannot be liable under § 1983. The question is whether Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law" when he killed his wife. *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *see also, Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) *quoting United States v. Classic*, 313 U.S. 299, 326 (1941) ("[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state' ").

Both the district court and the court of appeals correctly answered that question in the negative.

The undisputed facts show that Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman. Knick was not arresting his wife in his home; he was not serving papers; he was not investigating a crime; he was not performing any police duty. He had an argument with his wife which escalated to the point of violence and eventually murder.

The only fact suggested by petitioner to distinguish this tragedy from so many other fatal domestic disputes is that one of the participants was a policeman. It is settled, however, that the fact of an individual's employment by a police department does not cloak all the acts of that individual with the "color of state law." This Court long ago made this point, stating "acts of officers in the ambit of their personal pursuits are plainly excluded from the term 'color of law.' " *Screws v. United States*, 325 U.S. 91, 111 (1945). Similarly, the Seventh Circuit has held that "[a]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way 'related to the performance of police duties.' " *Briscoe v. LaHue*, 663 F.2d 713, 721 n.4 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983) (quoting *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1963)); *see also Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982) (officer who shot wife and committed suicide in private dispute did not act under color of state law). The court below correctly applied this settled principle of law to the undisputed facts before it.

Petitioner is wrong in claiming that this case would have been decided differently had it been decided under the standard for determining the existence of governmental action set forth in *San Francisco Arts and Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987). In the context of determining whether the actions of the United States Olympic Committee, a corporation chartered under federal law and funded in part with federal funds, were governmental actions, this Court held that only where the actions are the result of "significant encouragement, either overt or covert" by the government will those actions be deemed to be those of government. *San Francisco Arts*, 483 U.S. at 546. The Court emphasized that " 'mere approval of or acquiescence in' " the actions are not sufficient to create governmental action. *Id.* at 547, quoting *Blum v. Yaretesky*, 457 U.S. 991, 1004-1005 (1982). In this case, there was not a shred of evidence that the respondents encouraged Knick to harm his wife or even approved of Knick's criminal act in any way. This case would not have been decided differently under the *San Francisco Arts* analysis – a case petitioner did not cite below.

The other decisions cited by petitioner do not support his claim that this case would have been decided differently in other circuits. Each case cited involved materially different facts. In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987), for example, the court considered whether jail officials who entrusted a marked police car to a jail trustee, who murdered a motorist after using the car to pull her off the road, could be liable under 42 U.S.C. § 1983 for failing to control the trustee. The court answered the question in the affirmative noting that the

officials knew the trustee was dangerous and knew that he had been illegally stopping motorists and did nothing to prevent the activity. The court concluded that the jailers "facilitate[d] the crime by providing the [trustee] with the necessary means and the specific opportunity to commit his crime." *Nishiyama*, 814 F.2d at 281. *See also Cornelius v. Town of Highland*, 880 F.2d 348 (11th Cir. 1989) (municipality may owe special duty to protect persons in vicinity of inmates). Here, Knick was not in custody, and there was no evidence that the respondents "facilitated" the murder. The murder was, as the district court succinctly put it, the tragic result of a "garden variety domestic dispute" (Pet. App. 12). Thus, this case is easily distinguishable from *Nishiyama*.

This case is also distinguishable from other cases cited by petitioner involving persons in custody to whom the state may owe a special duty of protection. *See Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) (inmate murdered by fellow inmates against whom the decedent had given a statement to authorities); *Vosburg v. Solem*, 845 F.2d 763 (8th Cir. 1988) (inmate raped by fellow inmates); *Cortes Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988) (death of prisoner in overcrowded cell); *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987) (inmate injured in fight). Mrs. Knick, of course, was not in custody and, therefore, she was not owed a special duty of protection. *See Martinez v. California*, 444 U.S. 277, 285 (1980) (state not liable under § 1983 for murder of individual by paroled murderer even where state knew or should have known that parolee created a "clear and present danger" that such an incident would occur).

Contrary to petitioner's contention, neither *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993) nor *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1960 (1992) demonstrate that this case would have been decided differently in the Seventh and Fifth Circuits, respectively. *Reed* involved a § 1983 claim against policemen who left an obviously intoxicated passenger in the car of an individual arrested for drunk driving. The passenger drove the car and was involved in a head-on collision. Citing *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the court held that the policemen could be liable under § 1983 for creating the very danger which resulted in the accident. The existence of state action was not an issue, as the officers clearly were performing a law enforcement function when they arrested the drunk driver and left the keys with the drunk passenger.

Tarpley involved a policeman who, with the help of fellow officers, physically assaulted his wife's former boyfriend. Tarpley identified himself as a policeman, stated that he had the authority to kill the boyfriend and, after assaulting the boyfriend, followed him out of town in a patrol car with other policemen. *Tarpley*, 945 F.2d at 808. The court, not surprisingly, found state action because Tarpley used his special status to facilitate his assault and enlisted other officials to assist in the misconduct. *Tarpley*, 945 F.2d at 809. Significantly, the court applied the "color of state law" test established in *Screws v. United States*, 325 U.S. 91 (1944) – the test which the court of appeals applied in this case.

In sum, the courts below did nothing novel when they found no action under color of state law in this case.

They applied this Court's analysis to a particular set of facts and found no state action. That other courts, on plainly distinguishable facts, found state action in other cases does not detract from this conclusion.

II. DEFENDANTS HAD NO DUTY TO PROTECT MRS. KNICK FROM HER HUSBAND.

In *Martinez v. California*, 444 U.S. 277 (1980) and later in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) this Court made clear that state actors have no general constitutional duty to protect individuals from danger. Such a duty may arise, the *DeShaney* Court noted, only where the state played some part in creation of the particular danger or made the victim more vulnerable. *DeShaney*, 489 U.S. at 281. In this case, the court of appeals found that there was "simply no evidence that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death" (App. 4). Petitioner apparently takes issue with this fact-bound conclusion[5] when he argues that the court failed to recognize his decedent's "liberty interest" (Pet. 29) in being free from domestic violence. The claim does not warrant review.

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[5] Here, again, petitioner places great emphasis on the incident occurring almost nine months before the murder when Mrs. Knick, after catching her husband with another woman, turned his weapon in to the Department so he would not use it to threaten suicide as he had when previously confronted with his infidelity (J.A. 440-41). Mrs. Knick expressed no concern for her safety (J.A. 442) and, following evaluation and return of the weapon, Knick performed his duties without incident until the murder.

First, even if this "liberty interest" exists, the absence of state action is fatal to petitioner's claim. Thus, at best, this case presents a purely academic question.

Second, there is no general "liberty interest" in being free from domestic violence. The only case petitioner cites for the proposition is *Czajkowski v. City of Chicago*, 810 F. Supp. 1428 (N.D. Ill. 1992). In *Czajkowski*, a policeman, Garza, and his partner pulled alongside Garza's wife in a marked police car and signaled her to pull over because she had allegedly committed a traffic offense. *Czajkowski*, 810 F. Supp. at 1437. The wife complied. Garza then assaulted his wife and threatened to arrest her. Garza's partner failed to intervene. The court held that Garza was acting under color of state law, noting that he used his power as a policeman to facilitate his misconduct. *Id.* at 1437. The court also held that the Department could be liable for the assault because it failed to discipline officers for use of excessive force and showed deliberate indifference to domestic abuse as evidenced by the partner's failure to intervene. *Id.* at 1438-1440. The court did not find some general constitutional right to be free from domestic abuse. It simply held that on the particular facts before it the defendants could be liable under § 1983.

Czajkowski does not conflict with the Fourth Circuit's decision in this case. Indeed, the Fourth Circuit has not hesitated to find liability in circumstances analogous to those present in *Czajkowski*. *See e.g. Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) (police department liable for policeman's assault on arrestee where evidence showed that department was aware of and encouraged such assaults). Those circumstances, however, are not present in this case. Knick did

not act under color of state law, and there was no causal connection between any acts on the part of respondents and the murder.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

W. Fain Rutherford
Frank K. Friedman*
Randy V. Cargill
Woods, Rogers & Hazlegrove
P. O. Box 14125
Roanoke, Virginia 24038-4125
(703) 983-7600

(*Member U.S. Supreme Court Bar)

Counsel for Respondents

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CLINTON EDWARD VINCENT, JR., Administrator, Estate of Myra Lisa Vincent Knick, *Plaintiff-Appellant.* v. CITY OF LEXINGTON, a Virginia Municipal Corporation; HAUCH BEARD, City of Lexington Police Chief, *Defendants-Appellees.*	No. 92-2129

Appeal from the United States District Court
for the Western District of Virginia, at Lynchburg.
Jackson L. Kiser, District Judge.
(CA-91-48-L)

Argued: June 10, 1993

Decided: September 1, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and HAMILTON and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Thomas J. Foltz, Alexandria, Virginia; Franklin M. Slayton, South Boston, Virginia, for Appellant, William Fain Rutherford, Jr., WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees. **ON BRIEF:**

Randy V. Cargill, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Clinton Vincent, the Administrator of the Estate of Lisa Vincent Knick, filed a civil rights action pursuant to 42 U.S.C. § 1983 (1988) against the City of Lexington and the Chief of the Lexington Police Department (referred to herein collectively as "the City"). The complaint alleged that the City was liable for Lisa Knick's wrongful death because Jerry Knick, Lisa Knick's husband and an officer of the Lexington Police Department, was acting under color of state law when he shot and killed his wife. The district court granted summary judgment for the City, and we affirm.

I

This is a tragic case. Jerry Knick was hired as a policeman for the City of Lexington, Virginia in 1982. Four years later he married Lisa Vincent. For our purposes, it is enough to note that the marriage was not a happy one.

On September 29, 1990, a distraught Lisa Knick called Sergeant Miller of the Lexington Police Department and asked him to come to her home. Miller, who was a friend of both Jerry and Lisa Knick, was not on duty at the time

and agreed to come to the Knick home. Lisa Knick then told Miller about her dissatisfaction with her marriage. Later Officer Knick, who was on duty at the time, came to his home and was angry to find Miller there. Officer Knick left for about an hour, saying that he would allow his wife and Miller to finish their conversation, Miller was still there when Officer Knick returned. Officer Knick asked Miller to leave, and Miller complied. The Knicks then engaged in a heated argument. At some point, Knick pulled his service revolver from his holster. According to Officer Knick his wife then grabbed the weapon, causing it to fire one round into her left temple. A jury, sitting in the Circuit Court of Rockbridge County, convicted Knick of second degree murder based on a finding that Officer Knick killed his wife with malice. Jerry Knick is now serving a ten-year term of imprisonment for the murder of his wife.

On September 23, 1991, the Administrator of Lisa Knick's estate filed a suit against the City of Lexington and Chief of Police Beard alleging that under 42 U.S.C. § 1983 they were legally liable for Lisa Nick's death. The district court determined that Officer Knick was not acting under color of state law when he shot and killed his wife. Because action under color of state law is a necessary finding for the imposition of liability under § 1983, and finding no material facts in dispute, the district court granted Appellees' summary judgment motion.

II

To state a claim under § 1983, the appellant must allege the violation of a constitutionally protected right or

other right secured by federal law and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Applied to this case, if Knick's murder of his wife was not an action taken "under color of state law," there can be no § 1983 liability. *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). The question is whether Officer Knick acted "in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. at 49-50.

We have no difficulty concluding that Officer Knick's murder of his wife was in no way connected to his duties or responsibilities as a policeman. The only fact distinguishing this murder from other fatal domestic disputes is that Jerry Knick was a policeman. But the Supreme Court has made clear that acts of police officers in the ambit of their personal pursuits are plainly excluded from the term "color of law." *Screws v. United States*, 325 U.S. 91, 111 (1945). Although Officer Knick was on duty at the time these unfortunate events occurred, he was not acting within the scope of his official duties when he stopped by his house or when he shot his wife.

Citing *Gibson v. Chicago*, 910 F.2d 1510 (7th Cir. 1990), Appellant contends that the City remains subject to § 1983 liability even absent a finding that Knick acted under color of state law when he shot his wife. Appellant maintains that either the City's failure to adequately train Officer Knick, or its decision to retain Officer Knick on the police force in the face of alleged evidence that he was emotionally unstable, provides a sufficient basis for imposing § 1983 liability. But even if we agreed with Appellant's reading of *Gibson*, there is simply no evidence

that any act or omission on the part of the City of Lexington or Chief Beard was the proximate cause of Lisa Knick's death. Further, *Gibson* does not stand for the proposition that § 1983 liability may be imposed absent a finding Officer Knick acted under color of state law. See *Gibson*, 910 F.2d at 1514 ("Action under color of state law is a jurisdictional prerequisite to a § 1983 claim.").

As Judge Jackson Kiser stated: "This was a garden variety domestic dispute which had a tragic ending – the fact that Knick was a police officer was incidental and had nothing to do with state authority." (J.A. at 769). We agree, and affirm the district court's disposition of the § 1983 claim.*

AFFIRMED

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* Because the § 1983 claim provided the basis for federal jurisdiction in this action, the district court was correct to dismiss without prejudice Appellant's state law claims.